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IN THE

SUPREME COURT OF THE UNITED STATES

No. 148.

CARLOS J. MILLER,
CHARLES MORTON,
HOMER SHELTON,
For Themselves and on Behalf of All Other Trainmen and Yardmen Employed by the Louisville and Nashville Railroad Company, in Vanderburgh County, Indiana, Who Are Employed by Said Railroad Company in the Same Capacity as the Named Parties, Petitioners,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
RUSSELL M. HAYHURST, GEORGE KOENIG and
JAMES DUVALL,
For Themselves and on Behalf of All Those Members of the Brotherhood of Railroad Trainmen Who Are Employed by the Chicago and Eastern Illinois Railway Company as Switchmen and Yardmen in Its Yard in Evansville, Indiana,
A. F. WHITNEY, President, J. A. ZANGER, Vice-President, and G. W. ANDERSON, General Secretary and Treasurer, for Themselves and on Behalf of All Members of the Brotherhood of Railroad Trainmen, Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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INDEX.

Outline of Brief in Opposition to Petition for Writ of Certiorari.

Page

1. Caption and submission of brief..... 1
2. Opinion of the State Court..... 2
3. There are no grounds upon which the jurisdiction of the Supreme Court of the United States can be invoked in this cause..... 2
4. Additional statement of the case..... 3

   The Brotherhood of Railroad Trainmen..... 5

   Procedure within the Brotherhood upholding respondent's right to work in the L. and N. yards in Evansville 8
5. Summary of argument..... 10
6. Argument 12

   Point I.—The Supreme Court of the United States will not take jurisdiction to pass upon any question presented by the petition for a writ of certiorari herein for the following reasons..... 12

   (a) The Supreme Court of the United States has previously denied certiorari in an action which presented the same questions of law 12

   (b) The question involved in the decision of the Supreme Court of Indiana was not new and unexpected and the presentation of a claimed federal question for the first time in petitioners' petition for a rehearing before the Supreme Court of Indiana came too late..... 16

   (c) No property or civil rights are involved in this case, and therefore no federal question is presented by the petition.... 24

(d) A voluntary unincorporated association, such as the Brotherhood of Railroad Trainmen, may adopt a constitution and by-laws for the government of its members which are controlling in all internal matters of the association, and the courts will not interfere with the internal affairs of such an association so as to settle disputes between members, or questions of policy, discipline, or internal government, so long as the government of the association is fairly and honestly administered in conformity with its laws and the laws of the land and no property or civil rights are involved..... 24

(e) There was a judicial determination of the questions involved by a court of competent jurisdiction 29

Table of Cases Cited.

Aulich v. Craigmyle (Ky.), 59 S. W. (2d) 560.....22, 23, 28

Brotherhood of Railroad Trainmen v. Williams (Ky.), 277 S. W. 500.....23, 28

Brotherhood of Railroad Trainmen v. McMurray, 50 Fed. (2nd) 968 (D. C. Pa.).....23, 29

Brotherhood of Railroad Trainmen v. McMurray, 54 Fed. (2nd) 923 (3rd C. C. A.).....23, 29

Burger v. McCarthy (W. Va.), 109 S. E. 492.....23, 29

Crutcher v. Order of Railway Conductors (Mo.), 132 S. W. 307 .....23, 28

Donovan v. Travers (Mass.), 188 N. E. 705.....23, 26, 29

Evans et al. v. Johnson et al. (Ill.), 20 N. E. (2nd) 841, 301 Ill. App. XXII, 309 U. S. 662, 60 S. Ct. 582, 84 L. Ed. 1010 .....14, 15, 20, 21, 23, 28

George T. Ross Lodge v. Brotherhood of Railroad Trainmen (Minn.), 254 N. W. 590..... 15
Grand Int. Brotherhood of Locomotive Engineers v. Green (Ala.), 98 So. 569..... 27
Herdon v. State of Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794.....17, 18, 24
Herdon v. State of Georgia, 296 U. S. 661, 80 L. Ed. 471, 56 S. Ct. 82..... 17
Harris v. Missouri Pac. Ry. Co., 1 Fed. Sup. 946..... 31
Long et al. v. B. and O. Railroad (Md.), 141 Atl. 504.. 15
Long et al. v. Van Osdale et al., 218 Ind. 483, 29 N. E. (2nd) 953 .....19, 23, 29
Maloney v. United Mine Workers (Pa.), 162 Atl. 225..23, 28
Richards v. Morrison (Mass.), 118 N. E. 868..... 26
Simpson v. Brotherhood of Locomotive Engineers (W. Va.), 98 S. E. 580.....15, 23, 27, 28, 30
Shaup v. Brotherhood of Locomotive Engineers (Ala.), 135 So. 327.....23, 27, 28, 30, 31
State ex rel. Smith v. County Court (W. Va.), 88 S. E. 662 30
Whiting Milk Co. v. Grondin (Mass.), 184 N. E. 379... 26

Texts Cited.

5 Corpus Juris 1364, Par. 101.....23, 28
7 Corpus Juris Secundum 80, Par. 34.....23, 28

Statutes Cited.

Judicial Code of the United States, as amended, Sec. 237 2
Federal Code Annotated, Title 28, Sec. 344 (b)..... 2

Constitution of the United States.

Fourteenth Amendment 17, 24

IN THE

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No. 148.

CARLOS J. MILLER,
CHARLES MORTON,
HOMER SHELTON,
For Themselves and on Behalf of All Other Trainmen and Yardmen Employed by the Louisville and Nashville Railroad Company, in Vanderburgh County, Indiana, Who Are Employed by Said Railroad Company in the Same Capacity as the Named Parties, Petitioners,

vs.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
RUSSELL M. HAYHURST, GEORGE KOENIG and
JAMES DUVALL,
For Themselves and on Behalf of All Those Members of the Brotherhood of Railroad Trainmen Who Are Employed by the Chicago and Eastern Illinois Railway Company as Switchmen and Yardmen in Its Yard in Evansville, Indiana,
A. F. WHITNEY, President, J. A. ZANGER, Vice-President, and G. W. ANDERSON, General Secretary and Treasurer, for Themselves and on Behalf of All Members of the Brotherhood of Railroad Trainmen, Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

The respondents, Russell M. Hayhurst, George Koenig and James Duvall, for themselves and on behalf of all those members of the Brotherhood of Railroad Trainmen who are employed by the Chicago and Eastern Illinois

Railway Company as switchmen and yardmen in its yard at Evansville, Indiana; A. F. Whitney, President; J. A. Zanger, Vice-President, and G. W. Anderson, General Secretary and Treasurer, for themselves and on behalf of all members of the Brotherhood of Railroad Trainmen, and the Louisville and Nashville Railroad Company, a corporation, respectfully submit their brief in opposition to the Petition of Carlos J. Miller et al., petitioners, for a writ of certiorari.

I.

OPINION OF THE STATE COURT.

The opinion of the Supreme Court of Indiana will be officially reported in the Indiana Reports and has been reported in 38 N. E. (2d) 239; a true copy of same is set out in the Printed Record, pp. 98-103.

II.

THERE ARE NO GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES CAN BE INVOKED IN THIS CAUSE.

The jurisdiction of the Supreme Court of the United States cannot be invoked in this cause under Section 237 of the Judicial Code of the United States as amended, Federal Code Annotated, Title 28, Section 344 (b), or Section 1 of the Fourteenth Amendment of the Constitution of the United States, for the following reasons, to wit:

(a) There is no Federal Question involved.

(b) The petitioners have had a full and complete hearing and judicial determination of their claims in a court of competent jurisdiction which passed upon same, and have had a review of the trial court's decision by the highest tribunal of the State of Indiana.

(c) The State Court's decision rests upon an adequate nonfederal ground.

(d) No vested property rights, privileges or immunities are involved in this controversy, and therefore the decision of the Supreme Court of Indiana cannot be construed as taking property without due process of law.

(e) Every question presented by the petition herein was presented to the trial court and reviewed by the Supreme Court of Indiana. Petitioners did not claim that the questions presented or rights involved were Federal in nature until they filed a petition for rehearing in the Supreme Court of Indiana, and they could not present said claimed Federal question for the first time in a petition for a rehearing unless the decision of the Supreme Court of Indiana supplied a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. The Supreme Court of Indiana and the Supreme Court of the United States had previously passed upon this same question and therefore the decision of the Supreme Court of Indiana in the case at bar could not supply any **new and unexpected basis** for any claim of petitioners.

III.

ADDITIONAL STATEMENT OF THE CASE.

The facts outlined by petitioners under this heading are substantially correct. However, petitioners were not content to rely solely on the facts, and have added numerous comments and innuendoes which respondents dispute and maintain are incorrect.

On page 7, lines 3 to 12, of petitioners' brief we find the following language:

> "The petitioners herein were the plaintiffs in the trial court, and by their complaint alleged, and upon trial supported said allegations by proof that they

were employed by the Louisville and Nashville Railroad Company as switchmen and yardmen under a written collective labor agreement, through which they held certain seniority rights, together with the exclusive right to perform all switching and yard services in the yards of said railroad in Evansville, Indiana."

There is no provision in said agreement which gives petitioners any exclusive right to perform the switching and yard services in the Evansville yard of the Louisville and Nashville Railroad. In fact, petitioners proved upon trial, by several witnesses, that the Evansville, Indiana, yard of the Louisville and Nashville Railroad was not operated as a closed shop. (See testimony of N. E. Lane [Rec. p. 38, lines 15 to 18] and C. J. Becker [Rec. p. 48, lines 24 to 38]). This evidence is uncontradicted.

On page 8 of their brief, petitioners allege that on May 5, 1938, the Board of Appeals of the Brotherhood of Railroad Trainmen rendered a decision upholding the position taken by the Louisville and Nashville yardmen. This statement is true, but petitioners then allege that respondents acquiesced in this ruling until May and June, 1939. Respondents did not acquiesce in said decision but, under the Constitution of the Brotherhood of Railroad Trainmen, were bound to follow said decision until it was reversed by a higher tribunal of the Brotherhood. The only higher tribunal of the Brotherhood of Railroad Trainmen was, and is, the Grand Lodge Convention, which convened in May and June, 1939, for the first time since the Board of Appeals rendered its decision of May 5, 1938. Said decision was duly presented to and considered by said convention, which is the Supreme Governing Body of the Brotherhood of Railroad Trainmen, and the decision of said Board of Appeals was reversed with instructions to put into effect the prior ruling of the President upholding the position taken by the respondents.

In discussing the resolution passed by the Grand Lodge of the Brotherhood of Railroad Trainmen in convention assembled during the months of May and June, 1939, petitioners allege, on page 9 of their brief, that it was ultra vires and void. The Constitution of the Brotherhood of Railroad Trainmen provides that the Grand Lodge is the supreme governing body of the association and gives to the Grand Lodge the right to hear and determine all controversies brought before it by appeal or otherwise (Rec. p. 29, lines 5 to 10). This controversy was duly presented to the Grand Lodge, which body, after a full hearing, rendered a decision. The adoption of the resolution containing this decision by the Grand Lodge of the Brotherhood of Railroad Trainmen was neither ultra vires nor void, and is binding on both petitioners and respondents.

THE BROTHERHOOD OF RAILROAD TRAINMEN.

All of the men actively interested in this case are members of the Brotherhood of Railroad Trainmen, which is a voluntary unincorporated association organized September 23, 1883 (Rec. p. 35). The Louisville and Nashville Railroad Company was made a party by petitioners in order to make the injunction which they sought effective, but said railroad has taken no active part in this controversy from its inception up to the present time. The Brotherhood of Railroad Trainmen is made up of a number of Lodges. Each local Lodge handles the grievances of its men through a local Grievance Committee. The grievances of the men on any particular railroad are handled through a General Grievance Committee, which is composed of the Chairmen of all the local Grievance Committees of the Lodges on that railroad. All of the men actively interested in this controversy are members of Incline Lodge No. 242, located in the City of Evansville, Indiana. If

controversies arise between men on different railroads, the dispute is taken up by the General Grievance Committees for those railroads. If they are unable to agree a system of appeals is provided by the Constitution of the Brotherhood of Railroad Trainmen. All questions concerning the interpretation of the Constitution or laws of the Brotherhood of Railroad Trainmen are appealed to the President under Section 86 of the Constitution, which reads as follows:

> "The provisions of this Constitution and General Rules shall be interpreted and construed according to their most plain and obvious meaning, and should any doubt arise as to the proper construction of any section or rule thereof it shall be referred to the President of the Brotherhood, whose decision shall be final, unless reversed by the Board of Directors or by the Grand Lodge. Any officer or member of the Brotherhood desiring to appeal from an interpretation made by the President of the Brotherhood on the Constitution and General Rules may do so to the Board of Directors within ninety days from the date such decision was rendered or the Board of Directors may, upon their own motion, reverse the interpretation of the President of the Brotherhood. Should no appeal be taken to the Board of Directors within ninety days or should the Board of Directors not intervene at its next meeting, the decision of the President of the Brotherhood shall be final. Should an appeal be taken to the Board of Directors or should the Board of Directors intervene, and in either event render a (fol. 148k) decision, if not appealed from within ninety days to the Grand Lodge, the decision of the Board of Directors shall be final" (Rec. pp. 32-33).

All questions of fact arising under General Rule No. 10 were appealed to the Board of Appeals under Section 15-b of the Constitution:

"It shall be the duty of the Board of Appeals to meet SEMI-annually on the second Monday in April and October, at Brotherhood headquarters, to consider and determine all appeals arising under General Rule No. 10 of the General Rules and Section 149 of Constitution of the Brotherhood which have been appealed to the Board of Appeals. Immediately after their election the members of the Board shall meet and elect a Chairman and a (fol. 148g) Secretary. The Secretary shall keep a true and correct record of the proceedings of the Board. During such years in which no conventions are held, the Board shall report its proceedings to the subordinate lodges immediately after the close of each meeting. The Board shall submit a complete report of all of its transactions for the period between conventions to each session of the Grand Lodge. The decision of the Board upon each appeal coming before it shall be in writing, and shall state in clear and concise terms the decision of the Board giving reason and reference to justify and sustain such decision for the information of those interested in the appeal and other members of the Brotherhood. Such decision shall be the final adjudication of any and all rights and questions included in the appeal" (Rec. p. 31).

The supreme governing body of the Brotherhood of Railroad Trainmen was and is known as the Grand Lodge. It is composed of the Grand Lodge officers and delegates from each of the local lodges and meets in quadrennial conventions. The Grand Lodge, which created the Grand President and the Board of Appeals as subordinate tribunals within the Brotherhood, reserves to itself the right to hear and determine all controversies whether brought before it by appeal or otherwise under Section 6 of the Constitution, which reads as follows:

"The Grand Lodge has exclusive jurisdiction over all subjects pertaining to the Brotherhood, and its en-

actments and decisions upon all questions are the supreme law of the Brotherhood. The Grand Lodge may hear and determine all matters of controversy which may be brought before it by appeal or otherwise; issue all charters, reprove and punish the misconduct of subordinate lodges; adopt laws and regulations of general application for the government of the Brotherhood, and alter, amend, or repeal (fol. 148c) the same; control and regulate the unwritten work of the Brotherhood; establish, print, and supply all charters, constitutions, official receipts, rituals, dispensations, withdrawal, transfer and traveling cards of the Brotherhood; make such assessments for revenue as may be necessary to defray the expenses of the Grand Lodge, and do all things necessary to promote the welfare of the Brotherhood'' (Rec. p. 29).

PROCEDURE WITHIN THE BROTHERHOOD UPHOLDING RESPONDENTS' RIGHT TO WORK IN THE L. & N. YARDS IN EVANSVILLE.

The C. & E. I. station in Evansville was closed on July 13, 1935, with the approval of the proper authorities. The respondents demanded the right to follow into the L. & N. yards the work which they lost as a result of the closing of said station under the laws of the Brotherhood of Railroad Trainmen.

Prior to the time when this controversy arose a number of railroads consolidated and effected various types of mergers because of financial difficulties. So many members of the Brotherhood of Railroad Trainmen were affected that the Grand Lodge of the Brotherhood of Railroad Trainmen, many years before this controversy arose, passed a Declaration of Policy of the Brotherhood of Railroad Trainmen in relation to seniority rights of train and yard men on lines of railway or portions thereof where mergers are made effective. The C. & E. I. men claim the

right to follow the work which they lost into the L. & N. yards under Sections A and G of that Declaration, which reads as follows:

> "When through lease, purchase, or otherwise, a line or more than one line of railway, or any portion thereof, is taken over for operation purposes by another line, all train and yard men on the line, lines, or (an equitable number to man the) portion thereof taken over, shall be conceded the right to go with the line, or portion thereof, by which they had been previously employed, and shall be regarded as having prior rights in their respective classes to work or runs originating and terminating on the territory with which they are transferred.
>
> "Where new lines of railroad are built and no seniority exists, men from the old parent lines, from which traffic is diverted, will be transferred to the new lines in equal percentage to the mileage of the traffic diverted from the old line of road.
>
> * * * * * * *
>
> "In the merging of yard work operation by two or more railways, yardmen should be assigned to the merged work on the basis of yard engine hours worked by the respective lines in the respective yards for a consistent period or periods prior to merger, and should, for future assignment or promotion in the merged service, be placed on a merged roster with the seniority dates they held on their original yard roster" (Rec. pp. 34 and 35).

The L. & N. men denied the claim of the C. & E. I. men on the grounds that it would interfere with their seniority rights. The General Grievance Committees for the L. & N. and C. & E. I. Railroads were unable to agree and an appeal was taken to the President, who interpreted the laws of the Brotherhood and held that the C. & E. I. and L. & N. Railroads had effected a merger within the meaning of Sections A and G of the Declaration of Policy of the

Brotherhood of Railroad Trainmen, and upheld the right of the C. & E. I. men to follow their work into the L. & N. yards. A further appeal was taken to the Board of Appeals, who held that the C. & E. I. men would lose time as a result of the closing of the C. & E. I. station, but refused to follow the laws of the Brotherhood of Railroad Trainmen as interpreted by the President and determined that no merger was involved. The controversy was brought before the next Grand Lodge convention of the Brotherhood of Railroad Trainmen, who overruled the action of the Board of Appeals and sustained the right of the C. & E. I. men to follow the work into the L. & N. yard. The instant action was brought to enjoin the employment of the C. & E. I. men pursuant to the action of the Grand Lodge convention of the Brotherhood of Railroad Trainmen.

IV.

SUMMARY OF ARGUMENT.

1. The Supreme Court of the United States will not take jurisdiction to pass upon any question presented by the petition for a writ of certiorari herein, for each of the following reasons:

(a) **The Supreme Court of the United States has previously denied certiorari in an action which presented the same questions of law.**

(b) **The question involved in the decision of the Supreme Court of Indiana was not new and unexpected and the presentation of a claimed Federal question for the first time in petitioners' petition for a rehearing before the Supreme Court of Indiana came too late.**

(c) **No property or civil rights are involved in this case and therefore no Federal question is presented by the petition.**

(d) A voluntary unincorporated association, such as the Brotherhood of Railroad Trainmen, may adopt a constitution and by-laws for the government of its members which are controlling in all internal matters of the association and the courts will not interfere with the internal affairs of such an association so as to settle disputes between members, or questions of policy, discipline, or internal government, so long as the government of the association is fairly and honestly administered in conformity with its laws and the laws of the land and no property or civil rights are involved.

(e) There was a judicial determination of the questions involved by a court of competent jurisdiction.

ARGUMENT.

POINT I.

The Supreme Court of the United States will not take jurisdiction to pass upon any question presented by the petition for a writ of certiorari herein for the following reasons:

(a) **The Supreme Court of the United States has previously denied certiorari in an action which presented the same questions of law.**

For many years prior to July 14, 1935, there were two railroad stations located in the City of Evansville, Indiana. One was owned and operated by the Chicago and Eastern Illinois Railway Company and the other was owned and operated by the Louisville and Nashville Railroad. A union track joined the two stations. During all of the time involved in this controversy the C. &. E. I. Ry. Co. had ten trains arriving and ten trains leaving the City of Evansville each twenty-four hours. Six of these trains were referred to as "through trains" which came from Chicago, stopped at the C. &. E. I. station, crossed on the union track to the L. & N. station, and then continued south to Miami, Florida, or vice versa. The other four trains traveled from Chicago to the C. & E. I. station in Evansville and turned around and made the return trip. These were commonly referred to as "local trains." The C. & E. I. yardmen and switchmen did all of the switching and yarding on the four local trains and also all of the yarding and switching on the six through trains which originated in the C. & E. I. yards at Evansville, Indiana.

On July 14, 1935, the Chicago and Eastern Illinois Railway Co., with the permission of the proper authorities, discontinued the use of its station and yard in Evansville, Indiana. Since that time all C. & E. I. trains have used the

L. & N. station, pursuant to a written agreement between the C. & E. I. and L. & N. railroads providing for the joint use of the L. & N. station and yard facilities in Evansville, Indiana.

All of the men actively engaged in this case are members of the Brotherhood of Railroad Trainmen, a voluntary, unincorporated association, and were working under contracts which had been negotiated for them with the respective railroads by the Brotherhood of Railroad Trainmen. Commencing in 1929, many railroads had financial difficulties and there were numerous mergers and consolidations both of railroads and of yarding and station facilities. These mergers and consolidations affected so many members of the Brotherhood of Railroad Trainmen that the Grand Lodge Convention of that association enacted and adopted a Declaration of Policy with reference to seniority in mergers and consolidations. This Declaration of Policy was in force and effect and binding on all members of the Brotherhood of Railroad Trainmen when the C. & E. I. station in Evansville was closed and the L. & N. and C. & E. I. railroads entered upon their merged operation of station and yarding facilities.

This entire controversy arises out of the claimed right of the C. & E. I. switchmen and yardmen to follow the work which they lost as a result of the closing of the C. & E. I. station and yard in Evansville into the L. & N. yards. The C. & E. I. men based their right to work in the L. & N. yards on Articles A and G of the above-mentioned Declaration of Policy of the Brotherhood of Railroad Trainmen (Rec. p. 34, lines 20 to 38, and p. 35, lines 1 to 8).

The claim of the C. & E. I. men was denied by the L. & N. men on the grounds that the placing of any C. & E. I. men in L. & N. yards would interfere with the seniority rights held by the L. & N. men.

This controversy was presented to the duly constituted tribunals of the Brotherhood of Railroad Trainmen with

the result that in due course the Grand Lodge Convention sustained the claimed right of the C. & E. I. men. The case at bar was brought to enjoin the enforcement of the action of the Grand Lodge.

In April, 1939, the Appellate Court of Illinois passed upon this same question in the case of Evans et al. v. Johnson et al., 20 N. E. (2d) 841. Following a consolidation of two districts by the railroad, the Brotherhood of Locomotive Engineers attempted to put into effect a merged seniority roster. The complainants who claimed interference with their seniority rights were not members of the Brotherhood but were third party beneficiaries of the Brotherhood's contract with the railroad. The controversy was carried through the various tribunals and the merged roster was finally upheld by the Convention of the Brotherhood. The Appellate Court of Illinois held the complainants stood no higher than the members of the Brotherhood and sustained the action of the Convention. Judge Denis E. Sullivan, in his opinion, used the following language:

> "The plaintiffs sought to have declared null and void a certain merger agreement entered into between representatives of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers, and The Pennsylvania Railroad Company, effective December 1, 1930, by which the engineers' seniority rosters on the Ft. Wayne and Pan Handle Seniority Districts on the Chicago Terminal Division of the Pennsylvania Railroad were dovetailed as of the date of hire and a permanent injunction restraining the defendants from following or recognizing said merger agreement in the employment of engineers on said Chicago Terminal Division of the Pennsylvania Railroad. * * *
>
> "It seems to us that where a labor union, composed of employees of a company, whether the objector is a principal or an employee of a certain company,

where the rights of the employees are in the hands of the union for the purpose of settling disputes or adjustments of their rights, or have under consideration collective bargaining of any kind, that when an agreement is made, no fraud having been shown, it is to be presumed that they have had a fair hearing before their union committees and presented their side. Under these circumstances the employees would be bound by the actions of the officers of their union. * * *

"See also George T. Ross Lodge et al. v. Brotherhood of Railroad Trainmen, 191 Minn. 373, 254 N. W. 590; Long et al. v. Baltimore & Ohio Railroad, 155 Md. 265, 141 A. 504; Simpson v. Grand International Brotherhood of Locomotive Engineers, 83 W. Va. 355, 98 S. E. 580. * * *

"We are of the opinion that the parties, as plaintiffs, were bound by the action of their committees. They had a full, fair hearing. No fraud intervened and we believe they are bound by the actions of the committee of their union whose action was reviewed by the highest tribunal of their organization which was created by them to review and adjust these differences.

"For the reasons herein given the decree is reversed and the cause is remanded with directions to dismiss the bill of complaint for want of equity."

The Appellate Court of Illinois denied a rehearing of this case on May 8, 1939. A petition for leave to appeal was denied by the Supreme Court of Illinois on October 12, 1939 (301 Ill. App. XXII). A petition for a writ of certiorari to the Appellate Court of Illinois was denied by the Supreme Court of the United States on February 12, 1940 (309 U. S. 662, 60 S. Ct. 582, 84 L. Ed. 1010).

(b) **The question involved in the decision of the Supreme Court of Indiana was not new and unexpected and the presentation of a claimed Federal question for the first time in petitioners' petition for a rehearing before the Supreme Court of Indiana came too late.**

The petitioners, by their original complaint, sought to enjoin the employment of respondents in the L. & N. yards in Evansville, Indiana, on the ground that such employment would interfere with seniority rights held by petitioners. The prayer of their complaint reads as follows:

> "Wherefore, the plaintiffs pray the court that upon approving plaintiffs' bond tendered herewith for the approval of the court, that it enter a temporary restraining order against said defendants, without notice, restraining the defendants and each of them from employing a switchman or yardman of the Chicago and Eastern Illinois Railway Company in the yards of the defendant, Louisville and Nashville Railroad Company in the City of Evansville, Vanderburgh County, Indiana, and from in any manner interfering with the plaintiffs' right to seniority and employment as the employees of the Louisville and Nashville Railroad Company, and that the defendant, Louisville and Nashville Railroad Company, be temporarily restrained from employing any person as a switchman or yardman in the yards of said defendant, Louisville and Nashville Railroad Company, except one holding seniority as a switchman or yardman with said Louisville and Nashville Railroad Company, and that the court upon proper notice enter a temporary injunction against said defendants, enjoining said defendants as aforesaid during the pendency of this action, and that upon a final hearing said temporary injunction be made permanent, and that the court enter a judgment for costs against the defendants and each of them and for all other just and proper relief."

The respondents filed an answer in three paragraphs to said complaint. In their second paragraph of answer, re-

spondents alleged, and upon trial proved, that this controversy was presented to the various tribunals of the Brotherhood of Railroad Trainmen and was finally entertained, heard and determined by the Grand Lodge Convention of said Brotherhood, the highest tribunal and supreme governing body of said association, and further claimed the right to employment in the L. & N. yards at Evansville in accordance with said decision of the Grand Lodge (Rec. pp. 14-19).

It is, therefore, readily seen that the same question was presented to the trial court and to the Supreme Court of Indiana as is presented by the petition for a writ of certiorari herein. But the record discloses that petitioners did not claim that this question was Federal in nature, or that Section I of the Fourteenth Amendment to the Constitution of the United States had been violated, prior to the filing of a petition for a rehearing before the Supreme Court of Indiana. This was not a timely presentation of petitioners' claim that a Federal right had been violated.

Petitioners admit that this is true, but claim the presentation for the first time of a claimed violation of a Federal right in the petition for a rehearing before the Supreme Court of Indiana was timely in the case at bar because "the decision of the Supreme Court of Indiana supplied a new and unexpected basis for a claim by the petitioners of the denial of a Federal right."

But the authorities do not sustain petitioners because the Supreme Court of Indiana and the Supreme Court of the United States had previously passed on the same question, and the decision in the case at bar was neither new nor unexpected. In Herdon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530, 55 Sup. Ct. 794, rehearing denied in 296 U. S. 661, 80 L. Ed. 471, 56 Sup. Ct. 82, this court decided that there is nothing new or unexpected about a decision of a state

court if the decision was based upon a prior decision of the same court. In his opinion Justice Sutherland said, on pages 445 and 446 of the reports:

> "On this appeal the statute is assailed as contravening the due process clauses of the Fourteenth Amendment in certain designated particulars. We find it unnecessary to review the points made since this court is without jurisdiction for the reason that no Federal question was seasonably raised in the court below or passed upon by that court. * * *
>
> "The Federal question was never properly presented to the State Supreme Court unless upon motion for rehearing; and that court then refused to consider the long established rule that the attempt to raise a Federal question after judgment upon a petition for rehearing comes too late unless the court actually entertains the question and decides it. (Citing cases.) * * *
>
> "Petitioner, however, contends that the present case falls within an exception to the rule—now that the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction which threatened rights under the Constitution. There is no doubt that the Federal claim was timely if the ruling of the State Court could not have been anticipated and a petition for rehearing presented the opportunity for raising it. * * *
>
> "On March 18, 1933, several months prior to the action of the trial court on the motion for a new trial, the State Supreme Court had decided Carr v. State, 176 Ga. 747. In that case Section 56 of the Penal Code under which it arose was challenged as contravening the Fourteenth Amendment. The court in substance construed the statute as it did in the present case. * * *
>
> "Appellant, of course, cannot plead ignorance of the rule in the Carr case and was therefore bound to anticipate the probability of a similar ruling in his own case and preserve his right to a review hearing by an appropriate action upon the original hearing in the

court below. It follows that his contention that he raised the Federal question at the first opportunity is without substance and the appeal must be dismissed for want of jurisdiction."

The instant action was commenced with the filing of a complaint in the Superior Court of Vanderburgh County on September 30, 1940 (Rec. p. 1, line 20). The cause was tried on January 17, 18 and 20, 1941, and the trial court rendered its decision on February 18, 1941.

On November 25, 1940, after this cause was filed, but before trial, the Supreme Court of Indiana decided the case of Long et al. v. Van Osdale et al., 218 Ind. 483, 29 N. E. (2d) 953. In its opinion the Supreme Court of Indiana holds that a labor union retains the right to change its contract with a railroad even though the seniority rights of the individual members of the union are affected by the change. In delivering the opinion Judge Fansler uses the following language on pages 954 and 955 of the Reporter:

"The appellants were plaintiffs below. They are 265 in number and are employed by the Pennsylvania Railroad Company as locomotive engineers. 268 of the appellees are employed by the Pennsylvania Railroad Company as locomotive engineers and are members of a labor organization known as the Brotherhood of Locomotive Engineers. The remaining appellees are the Pennsylvania Railroad Company and certain officers of the Brotherhood of Locomotive Engineers. The controversy involves the respective seniority rights of the two groups of employees. * * *

"It is alleged that, while the agreement above referred to was in force, the Engineers' Committee, acting through its chairman, and without authority of the plaintiffs, entered into an agreement with the Railroad Company consolidating the engineer Seniority Rosters for the Fort Wayne Main Line Road and

the Fort Wayne and Lima Yards, by ranking all engineers in the order of their employment; in other words, by dovetailing; that this agreement injuriously affects the seniority rights of the plaintiffs; that the Railroad Company and the General Chairman of the General Committee of Adjustment of the Brotherhood of Locomotive Engineers threaten and intend to put the new schedule agreed upon in effect. The complaint prays that this latter agreement be declared void, and that an injunction be issued to restrain its being put into effect. Demurrers to the complaint were sustained, and, the plaintiffs having refused to plead further, there was judgment for the defendants. * * *

"Appellants' complaint is that their status has been changed, but the contract, upon which their seniority rights are founded, contemplated the possibility of a change that would affect those rights, set up agencies with authority to agree to changes, provided for an appeal by the individuals affected, and established an agency for final review and final determination of all questions that might arise. The appellants allege that they acquiesced in and accepted the benefits of the contract. In so doing they must be deemed to have accepted the burdens and conditions also.

"The Appellate Court of Illinois recently considered the rights of engineers under the identical contract here involved, in a case in which the complaint was substantially the same as in the case at bar. It reached the conclusion that the 'reservation of authority was binding upon the beneficiary to this contract and that the Committee had full authority to represent them.' It concluded that the bill of complaint should be dismissed for want of equity. The terms of the contract will be more fully disclosed by an examination of that opinion; and the authorities there cited and relied upon sustain the views here expressed. See Evans et al. v. Johnston et al., 1939, 300 Ill. App. 78, 98, 20 N. E. 2d 841, 847. Petition for leave to appeal denied by Supreme Court of Illi-

nois, 301 Ill. App. xxii. Petition for certiorari denied, February 12, 1940, 309 U. S. 662, 60 S. Ct. 582, 84 L. Ed. 1010."

The case of Evans v. Johnson, supra, which is cited, approved, and relied upon by the Supreme Court of Indiana in the above quoted decision, has been previously cited herein. In discussing the right of a labor union to change its contract with a railroad even though the change affected the seniority rights held by individual members of the union, the Appellate Court of Illinois said:

> "The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent; it is a principal.
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> "It seems to us that where a labor union, composed of employees of a company, whether the objector is a principal or an employee of a certain company, where the rights of the employees are in the hands of the union for the purpose of settling disputes or adjustments of their rights, or have under consideration collective bargaining of any kind, that when an agreement is made, no fraud having been shown, it is to be presumed that they have had a fair hearing before their union committees and presented their side. Under these circumstances the employees would be bound by the actions of the officers of their union."

The Supreme Court of the United States denied certiorari in that case on February 12, 1940, so that, prior to the time when the trial court rendered its decision in the instant case, the Supreme Court of Indiana, the Appellate Court of Illinois and the Supreme Court of the United States had passed directly upon the issues presented by petitioners' complaint and respondents' answer.

The decision of the Supreme Court of Indiana followed

a long line of decisions on this question which were, and are, not only the weight of authority but were, and are, the sole authority. There are no decisions of courts of last resort holding to the contrary.

The general and well-recognized rule is clearly stated in the case of Aulich v. Craigmyle, 59 S. W. (2d) 560. Craigmyle was a telegraph operator who worked for the L. & N. Railroad and was a member of the Order of Railway Telegraphers, whose constitution and by-laws were very similar to that of the Brotherhood of Railroad Trainmen. He brought this action to prevent interference with seniority rights which he claimed. The Court of Appeals of Kentucky in passing on this question said, on page 563 of the Reporter:

> "The members of the Railroad Telegraphers Union possessed the absolute right to formulate and adopt such constitution and by-laws as they deemed proper to accomplish the purpose of the organization. Being a voluntary association, its constitution and by-laws become a part of the obligations entered into by a member when he joins. In a controversy between a member and the association, the remedies lie within the organization, and as a general rule they must be exhausted before an appeal by a member to the courts (citing cases). The general applicable rules in such cases were formulated and stated in Roxbury Lodge v. Hacking, supra; Walsche v. Sherlock, 110 N. J. Eq. 223, 159 Atl. 661. It is not within the province of the court to inquire into and determine the expediency, practicability, or wisdom of the constitution and by-laws of the Order of Railroad Telegraphers, nor to relieve its members of the operation or enforcement thereof, so long as they do not violate, trespass upon, or destroy the property or contractual right of its members, or transgress the bounds of reason, or contravene public policy or the laws of the land. In connecting himself with the organization, Craigmyle subjected himself fully and completely to the power of its administration, within the legal limits of the power

of the organization. On becoming a member thereof his right of seniority was controlled thereafter by its by-laws which were at that time in force or thereafter adopted (citing cases). His right to seniority before becoming a member of the organization was subject to the right of adoption, or discretion, of the railroad company to recognize it or not. His right thereto prior to his return to the Cincinnati Terminal was in no sense a vested, contractual or property right, justifying the court, either then or now, in interfering to preserve it" (citing cases).

The following additional authorities follow this rule, most of which are cited and quoted by the Supreme Court of Indiana in decision in the case at bar:

Brotherhood of Railroad Trainmen v. Williams (1925), 277 S. W. 500 (Ky.);

Shaup v. Brotherhood of Locomotive Engineers (1931), 135 So. 327 (Ala.);

Aulich v. Craigmyle (1933), 59 S. W. (2nd) 560 (Ky.);

Maloney v. United Mine Workers (1932), 162 Atl. 225 (Pa.);

Brotherhood of Locomotive Engineers v. Simpson (1929), 98 S. E. 580 (W. Va.);

Crutcher v. Order of Railway Conductors (1910), 132 S. W. 307 (Mo.);

Evans et al. v. Johnston et al. (1939), 20 N. E. (2nd) 841 (Ill.);

5 C. J. 1364, Par. 101;

7 C. J. S. 80, Par. 34;

Brotherhood of Railroad Trainmen v. McMurray (1931), 50 Fed. (2nd) 968 (D. C. Pa.);

Brotherhood of Railroad Trainmen v. McMurray (1934), 54 Fed. (2nd) 923 (3rd C. C. A.);

Burger et al v. McCarthy (1919), 109 S. E. 492 (W. Va.);

Donovan v. Travers (1934), 188 N. E. 705 (Mass.);

Long v. Van Osdale (1940), 29 N. E. (2nd) 953 (Ind.).

It is clear that there was nothing new or unexpected in the decision of the Supreme Court of Indiana in the instant case, and under the holding of this court in Herdon v. State of Georgia, supra, and the cases cited therein, petitioners have failed to bring themselves within the exception to the general rule. The presentation of a claimed Federal question for the first time in the petition for a rehearing before the Supreme Court of Indiana was not seasonable, and certiorari therefore should be denied.

(c) **No property or civil rights are involved in this case and therefore no Federal question is presented by the petition.**

(d) **A voluntary unincorporated association, such as the Brotherhood of Railroad Trainmen, may adopt a constitution and by-laws for the government of its members which are controlling in all internal affairs of such an association so as to settle disputes between members, or questions of policy, discipline, or internal government, so long as the government of the association is fairly and honestly administered in conformity with its laws and the laws of the land and no property or civil rights are involved.**

Respondents will discuss these two points together because they have uniformly been considered as corollaries of each other by the courts.

Petitioners assert that the judgment and opinion of the Supreme Court of Indiana in the case at bar violates that portion of Section I of the Fourteenth Amendment of the Constitution of the United States, which reads as follows, to wit:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law."

This necessarily presupposes that petitioners have some property. Petitioners assert that the seniority which they

held under the contract between the Brotherhood of Railroad Trainmen and the Louisville and Nashville Railroad was property which could not be taken away from them without due process of law, but the courts, without exception, have held that seniority held by virtue of a union contract, although of some value, is not such a property right as would warrant or justify the interference of a court of law or equity to preserve it.

When a person makes application and becomes a member of a voluntary unincorporated association he enters into a compact with all members of the association to be bound by and submit to the constitution, by-laws, and general rules, and to abide by the decision of the duly constituted tribunals in all internal matters of the association, and the courts will not interfere with the regular and lawful administration of the laws of the association or the decisions of the duly constituted tribunals of the association.

Seniority is a right held by a member of a labor union solely by virtue of his membership in the union. It is an internal affair of the union, subject to change at any time by the union, and subject to review at all times by the duly constituted tribunals of the union or association. An employee of a railroad who is a member of a labor union, such as the Brotherhood of Railroad Trainmen, stands no higher than the union, and, if the union modifies an agreement with his employer, the employee must acquiesce in the modification. The union is not an agent. It is a principal. The courts will not interfere with the internal affairs of a voluntary, unincorporated association so as to settle disputes between members, or questions of policy, discipline, or internal government, so long as the government of the association is fairly and honestly administered in conformity with its laws and the laws of the land and no property or civil rights are involved.

In the case of Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 (Mass. 1934), the Supreme Judicial Court of Massachusetts discussed these questions as follows:

> "The substantial issue is whether the rights of the plaintiffs are fixed by the terms of the agreement between the union and the railroad as it stood when the several plaintiffs entered upon their service interpreted only in the light then available: or whether, as the agreements changed from time to time, the modifications and possible changes in interpretation of terms agreed upon by the union and the railroad modified and affected the individual contracts of those already in the railroad's employ. We think the latter to be the proper position. The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent. It is a principal. See Whiting Milk Companies v. Grondin (Mass.), 184 N. E. 379. * * *
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> "A controversy over the respective rights of employees at work in the yards at Lawrence and Peabody in contradistinction to the rights of those formerly employed in the abandoned yard at Lynn was, properly, presented to the general grievance committee for its decision. The correct determination depended upon the construction to be given article 2 of the agreement between corporation and brotherhood. It is settled law that members of an unincorporated, voluntary association, like the brotherhood, are bound by the determination of the association's tribunals if the decision is reached after observance of the formalities it prescribes, after fair opportunity for presenting their case, where there has been no excess of jurisdiction, no bad faith or capricious, unreasonable or arbitrary action. Richards v. Morison, 229 Mass. 458, 461, 118 N. E. 868. * * *

"Although a right of seniority such as is here asserted is undoubtedly a valuable property, it arises only from agreement. We see no illegality in a rule that one who acquires seniority in a particular place and who is entitled to carry it with him to another, must reckon seniority in that other place from the time at which the right to its exercise in that other place accrued to him. One is not deprived of property thereby."

The Supreme Court of Alabama decided the same question in 1931 in the case of Shaup v. Brotherhood of Locomotive Engineers, 135 So. 327. The court in its opinion said on page 328 of the Reporter:

"The facts alleged are incompatible with any charge of fraud or unfair or arbitrary ruling, and no such charge is made, but they show only a construction of the rules of the order upon a matter as to which an honest difference of opinion may well appear to exist. But the courts are indisposed to interfere with the internal management of such organizations, and do not grant relief under such circumstances. Grand International B. of L. Engineers v. Green, 210 Ala. 496, 98 So. 569, 572. As said by the West Virginia Court, Simpson v. Grand International B. of L. Engineers, 83 W. Va. 355, 98 S. E. 580, 587: 'The construction of the organic agreement, by-laws, rules and regulations of a benefit society or other unincorporated voluntary association belongs, not to the court, but to the board, council, or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense or fairness, nor contravene public policy or the laws of the land, in their conclusions and decisions, the courts cannot interfere with them. * * *'

"The facts stated in the bill only show an interpretation of the rules of the order by lawful authorities in

good faith and in consonance with sound reasoning. The seniority rights of complainant were by virtue of agreement between the brotherhood and the railway company, and it would seem subject to be vacated by mutual consent; either party having the right to withdraw therefrom on thirty days' notice. As said by the court in McMurray's Case, supra, this right is therefore 'somewhat intangible' and it is quite clear such seniority right did not create such a vested property right as to justify the interference of a court of equity. * * *

"The bill is also defective in failing to disclose that complainant had first exhausted all remedies within the brotherhood before resorting to the courts (citing authority). The chancellor sustained the demurrer and dismissed the bill, upon the theory that it contained no amendable defect (citing authority). We are in accord with that view, as complainant's case comes within the rule of noninterference by the courts in internal management of such voluntary associations."

Other cases following this general rule are numerous. The leading ones are:

Brotherhood of Railroad Trainmen v. Williams (1925), 277 S. W. 500 (Ky.);

Shaup v. Brotherhood of Locomotive Engineers (1931), 135 So. 327 (Ala.);

Aulich v. Craigmyle (1933), 59 S. W. (2nd) 560 (Ky.);

Maloney v. United Mine Workers (1932), 162 Atl. 225 (Pa.);

Brotherhood of Locomotive Engineers v. Simpson (1929), 98 S. E. 580 (W. Va.);

Crutcher v. Order of Railway Conductors (1910), 132 S. W. 307 (Mo.);

Evans et al. v. Johnston et al. (1939), 20 N. E. (2nd) 841 (Ill.);

5 C. J. 1364, Par. 101;

7 C. J. S. 80, Par. 34:

Brotherhood of Railroad Trainmen v. McMurray (1931), 50 Fed. (2nd) 968 (D. C. Pa.);
Brotherhood of Railroad Trainmen v. McMurray (1934), 54 Fed. (2nd) 923 (3rd C. C. A.);
Burger et al. v. McCarthy (1919), 109 S. E. 492 (W. Va.);
Donovan v. Travers (1934), 188 N. E. 705 (Mass.);
Long v. Van Osdale (1940), 29 N. E. (2nd) 953 (Ind.).

(e) **There was a judicial determination of the questions involved by a court of competent jurisdiction.**

In passing upon the issues presented by petitioners' complaint and respondents' answer thereto, the court had to decide two questions. First, the court had to determine whether or not petitioners had a full and complete hearing before the tribunals of the Brotherhood of Railroad Trainmen, and whether or not the laws of the Brotherhood had been fairly and honestly administered. Second, it was necessary for the Court to determine whether or not petitioners had some property right which would justify the interference of a court of law or equity even though petitioners had a full and fair hearing before the tribunals of the Brotherhood.

Petitioners had ample opportunity to present their evidence on these questions to the trial court, and did. The trial court passed upon these two questions in rendering its decision in this case. Upon appeal to the Supreme Court of Indiana, the same two questions were presented; in fact, they were the only questions presented to that Court.

The Supreme Court of Indiana passed squarely upon both questions. In answering the first question the Court said:

> "The controversy involves nothing more or less than a construction of the constitution and laws of the

brotherhood and a determination of the jurisdiction of the board of directors, the board of appeals, and the grand lodge. The appellees contend that seniority rights are property rights, and that courts will interfere in the activities of voluntary associations in order to protect property rights. The seniority rights arose out of, and by virtue of, an agreement between the brotherhood and the railroad company. Whatever seniority the appellees enjoy vests in them by virtue of their having become members of the brotherhood. The rights are granted to them as members subject to the condition that they comply with the rules of the brotherhood, and that the right to seniority as between the members of the brotherhood shall be determined under the laws of the brotherhood. See Shaup v. Grand International B. of L. Engineers et al. (1931), 223 Ala. 202, 135 So. 327" (Rec. p. 101).

In discussing the second question the Supreme Court of Indiana said:

"In Simpson v. Grand International B. of L. Engineers (1919), 32 W. Va. 355, 373, 98 S. E. 587, it is said: 'The construction of the organic agreement, bylaws, rules and regulations of a benefit society or other unincorporated voluntary association belongs, not to the court, but to the board, council or other tribunal provided for the purpose in the organization, if any. So long as the body upon which this power of interpretation has been conferred does not substitute legislation for interpretation, nor transgress the bounds of reason, common sense or fairness, nor contravene public policy or the laws of the land, in their conclusions and decisions, the court cannot interfere with them.' And it was said by the same court in State ex rel. Smith v. County Court (1916), 78 W. Va. 168, 172, 88 S. E. 662, 664, 20 A. L. R. 1030, 1033: 'The right of a voluntary association to interpret and administer its own rules and regulations is as sacred as is the right to make them, and there is no presumption against just and correct action or conduct on the

part of its supervising or appellate authorities and tribunals. On the contrary, the presumption is in favor of it. In connecting himself with the organization, a member subjects himself as fully and completely to the power of administration, within legal limits, as to the power of legislation or prescription. To say courts can make rules and regulations for such associations would be absurd and ridiculous. To say they may interpret and apply them, in view of the powers reserved to, and exercised by, the governing bodies of the association, would be as plainly subversive of contractual right.' These cases and many others are discussed and cited in Shaup v. Grand International B. of L. Engineers et al., supra.

"In Harris v. Missouri Pac. R. Co. et al. (1931), 1 Fed. (fol. 411) Supp. 946, 949, 950, the court said, after reviewing the facts and the contentions of the parties and the principles involved, which were substantially like those in the case under consideration: 'The organization, by its constitution and by-laws, had constituted officers and tribunals to pass upon these questions of order and procedure, and they were duly passed upon by such duly constituted officers and tribunals. These were strictly questions of interpretation and construction of the constitution and by-laws of the union. That the courts will not review the correctness of the interpretation fairly placed upon the constitution and by-laws of a voluntary association by its duly authorized tribunals, particularly where only a procedural or jurisdictional question is involved, seems to be the settled rule.' The authorities cited and those we have referred to support the conclusion in which we must concur" (Rec. pp. 102-103).

Petitioners have had a full and complete hearing before the duly constituted tribunals of the Brotherhood of Railroad Trainmen. They have had a full and complete judicial determination of the issues presented by the pleadings, by a court of competent jurisdiction, which judicial

determination has been reviewed and passed upon by the Supreme Court of Indiana, the highest tribunal in said State.

No property has been taken from petitioners, and they have had due process of law. The decision of the Supreme Court of Indiana follows a long line of decisions by the courts of last resort of almost every State in the United States, all of which have uniformly followed the same rule. The decision of the Supreme Court of Indiana rests upon adequate nonfederal grounds.

CONCLUSION.

Certiorari should be denied.

Respectfully submitted,

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